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8 Attorneys for Plaintiff Gwendolyn Nolan
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

IN RE:

WILLIAM K. SPENCER,

Debtor.

GWENDOLYN NOLAN,

Plaintiff,

vs.

WILLIAM K. SPENCER,

Defendant

Case No.: 2:20-bk-10401-BB
Adv. Case. No: 2:20-ap-01103-BB

**AMENDED NOTICE OF MOTION
AND MOTION TO COMPEL
DEFENDANT WILLIAM K.
SPENCER'S INITIAL
DISCLOSURES PURSUANT TO
FED. RULE CIV. PROC., RULE 26;
REQUEST FOR MONETARY
SANCTIONS IN THE AMOUNT
OF \$1,365.00 AGAINST
DEFENDANT WILLIAM K.
SPENCER**

Date: February 23, 2021
Time: 2:00 p.m.
Courtroom: 1539

NOTICE OF MOTION TO COMPEL INITIAL DISCLOSURES

Please take notice that on February 23, 2021 at 2:00 pm in courtroom 1539 at that Edward R. Roybal Courthouse, located at 255 E. Temple St., Los Angeles, CA 90012, Pursuant to Fed. R. Civ. P. 37(a)(1), Plaintiff respectfully moves this Court for an Order compelling Defendants to provide complete initial disclosures consistent with Fed. R. Civ. P. 26(a)(1).

1 Furthermore, Plaintiff respectfully moves this Court for an Order imposing monetary
2 sanctions in the amount of \$1,365.00 against Defendant due to Defendant's failure to
3 provide his complete initial disclosures as called for in Federal Rule of Civil Procedure,
4 Rule 26 (a)(3)(A).

5 Moreover, Plaintiff respectfully moves this Court for equitable sanctions precluding
6 Defendant from offering any evidence or witnesses Defendant intended to introduce or
7 offer at the time of trial due to Defendant's failure to provide his initial disclosures,
8 pursuant to Federal Rule of Civil Procedure, Rule 37(c)(1).

9 This Motion is based on this Notice, Plaintiff's Memorandum of Points and
10 Authorities in support thereof; the accompanying declaration of Richard J. Uss filed
11 concurrently with this motion; and on other oral or written argument that may be offered by
12 the parties at or before any hearing on this motion.

13 A proposed order is attached hereto.

14 Dated: January 27, 2021

15 Respectfully submitted,



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18 By: Richard J. Uss
19 Nussbaum APC
20 27489 Agoura Road, Ste. 102
21 Agoura Hills, California 91301
22 Attorneys for Plaintiff
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**UNITED STATES BANKRUPTCY COURT
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IN RE:

WILLIAM K. SPENCER,

Debtor.

GWENDOLYN NOLAN,

Plaintiff,

vs.

WILLIAM K. SPENCER,

Defendant

Case No.: 2:20-bk-10401-BB
Adv. Case. No: 2:20-ap-01103-BB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO COMPEL
PLAINTIFF WILLIAM K.
SPENCER'S INITIAL
DISCLOSURES**

Date: February 23, 2021
Time: 2:00 p.m.
Courtroom: 1539

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S INITIAL DISCLOSURES**

22 Fed. R. Civ. P. 26(a)(1) and *Federal Rules of Bankruptcy Procedure*, Rule 7026
23 required Defendants to disclose the individuals, documents, and information that Defendant
24 "may use" to support his defenses no later than ten (10) days of the parties' Rule 26
25 Conference, that of which occurred by and between the parties on or about June 12, 2020.
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Defendant has failed to provide Plaintiff with any disclosures as mandated by Fed. R. Civ. P. 26(a)(1), and despite Plaintiff's attempts to meet and confer with Defendant, in both writing and telephonically, Defendant has ignored its requirements to comply with the requirements of Rule 26, necessitating this Motion to Compel.

In light of the expedited scheduling of this case, Plaintiff respectfully requests that the Court order Defendant to respond to this Motion (preferably by electronic service), if at all, by no later than Monday, February 1, 2021, with Plaintiff's Reply due on Friday, February 5, 2021.

BACKGROUND

Plaintiff served her initial disclosures on June 9, 2020. Despite Defendant's deadline to serve his initial disclosures no later than June 22, 2020, Defendant has refused, and continues to refuse, to serve his initial disclosures as required.

During the parties' telephonic conferences to meet and confer regarding the status of this matter, including discovery and the upcoming status conference on or about June 9, 2020, Plaintiff inquired into Defendant's expected Rule 26 disclosures. Defendant intimated that such disclosures would be provided as required.

Despite not having received Defendant's requisite Rule 26 disclosures as required and promised previously, and identified by this Court at the October 6, 2020 status conference, on January 14, 2021, Plaintiff directed an email correspondence to Defendant inquiring into the status of Defendant's Rule 26 disclosures. *See*, Exhibit A. No response was received.

On January 19, 2021, in a last ditch attempt to avoid having to bring this matter to this Court’s attention, Plaintiff directed a subsequent email to Defendant inquiring into when Plaintiff would be in receipt of Defendant’s mandatory Rule 26 disclosures. *See, Exhibit B.*

As a result of Plaintiff's email, Defendant contacted Plaintiff and, with Defendant feigning ignorance, claimed that the attorney that has been assisting Defendant is "unavailable" and without the assistance of this currently unknown counsel, Defendant

1 would be unable to put together his Rule 26 disclosures without Plaintiff's helping
2 Defendant do so. Defendant informed Plaintiff that Defendant would, nevertheless, look
3 into getting Plaintiff the necessary initial disclosures no later than the date Plaintiff
4 identified in Plaintiff's latest email correspondence.

5 Defendant's Rule 26 disclosures were never received. Instead of the Rule 26
6 disclosures, Plaintiff received what appeared to be a recycling of a previously-provided
7 joint status report, generated by Plaintiff, which included numerous notations of the
8 encircled word "same". The document received was not Defendant's Rule 26 disclosures.
9 lining out of what amounted to outdated information. *See, Exhibit C.*

10 In response to Defendant's email, on January 26, 2021, Plaintiff notified Defendant
11 that the document received was not Defendant's Rule 26 disclosure and that the Rule 26
12 disclosures were necessary. *See, Exhibit D.* No response has been received.

13 To date, Defendant has yet to provide his Rule 26 disclosures, necessitating this
14 instant Motion.

15 **ARGUMENT**

16 **I. Legal Standard**

17 Pursuant to Fed. R. Civ. P. 37(a)(3)(A), if a party "fails to make a disclosure
18 required by Rule 26(a), any other party may move to compel disclosure and for appropriate
19 sanctions." Before such a motion is made, the moving party must "in good faith" confer or
20 attempt to confer with the party that has failed to make the disclosure in an effort to avoid
21 court involvement. *See Fed. R. Civ. P.* 37(a)(1).

22 Fed. R. Civ. P. 26(a)(1) requires that a party "must, without awaiting a discovery
23 request," identify "each individual likely to have discoverable information—along with the
24 subjects of that information—that the disclosing party may use to support its claims or
25 defenses" and provide a copy or description of "all documents, electronically stored
26 information, and tangible things that the disclosing party has in its possession, custody, or
27 control and may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i), (ii).
28 Initial disclosures are to be made based on the information "then reasonably available" to

1 the party, and a party is not excused from this obligation simply because “it has not fully
2 investigated the case.” Id. 26(a)(1)(E). The purpose of initial disclosures is for parties to
3 provide “basic information that is needed [...] to prepare for trial or make an informed
4 decision about settlement.” Id. 26(a)(1), advisory committee’s note (1993 Amendment §
5 (a)).

6 Where “a party fails to make a disclosure required by Rule 26(a),” any other party
7 “may move to compel disclosure and for appropriate sanctions.” Fed. R. Civ. P.
8 37(a)(3)(A). “[T]he party or person resisting discovery, not the party moving to compel
9 discovery, bears the burden of persuasion.” Kinetic Concepts, Inc. v. Convatec Inc., 268
10 F.R.D. 226, 243 (M.D.N.C. 2010) (collecting cases).

11 District courts in this Circuit routinely grant motions to compel where a party fails to
12 provide the disclosures required under Rule 26. See, e.g., Pledger v. UHS-Pruitt Corp.,
13 2013 WL 5603259, at *2 (E.D.N.C. Oct. 11, 2013) (compelling initial disclosures where
14 none were provided); Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat’l Ass’n., 2016
15 WL 3452734, at *2 (D.S.C. June 24, 2016) (holding promise of future supplementation
16 insufficient and compelling initial disclosure of damages computations based on currently
17 known information).

18 A. **Plaintiff Has Been Prejudiced by Defendant’s Failure To Timely Disclose**
19 **Pursuant To Rule 26(a).**

20 Defendant’s apparent refusal to serve complete and accurate initial disclosures
21 prejudices Plaintiff’s ability to litigate this case. While discovery has already closed as of
22 September 30, 2020, arguably Defendant has all of the information at its disposal that it
23 intends to use at the time of trial. As such, Plaintiff is entitled to that information in
24 Defendant’s possession. In other words, Defendant has apparently unilaterally decided to
25 withhold his evidence from Plaintiff until the time of trial, to then spring it on Plaintiff, to
26 Plaintiff’s prejudice. Defendant’s obfuscation materially impairs Plaintiff’s ability to
27 prepare for trial, and in part acted as a means to forestall Plaintiff’s conduction of
28 discovery. See Winston v. Land Transp., LLC, 2007 WL 2471063, at *2 (E.D. Va. Aug. 27,
-6-

1 2007) ("It is beyond question that the disclosures required by Rule 26 are the basis for the
2 framing of further discovery requests by the adverse party.").

3 Moreover, despite Defendant having rudimentarily identified certain evidence and
4 witnesses in its Joint Statement (See, ECF NO. 5) Plaintiff cannot adequately prepare for
5 trial if Defendant continues with this particular game of hide the ball, requiring that
6 Plaintiff essentially shoot at a moving target.

7 "Initial disclosures should provide the parties 'with information essential to the
8 proper litigation of all relevant facts, to eliminat[e] surprise, and to promot[e] settlement.'" 9
Sender v. Mann, 225 F.R.D. 645, 650 (D. Colo. 2004) (quoting Windom v. FM Industries, Inc., 2003 WL 21939033 (D. Neb. 2003)).

11 In short, the Rule 26(a)(1) disclosure requirements should "be
12 applied with common sense in light of the principles of Rule 1,
13 keeping in mind the salutary purposes that the rule is intended
14 to accomplish. The litigants should not indulge in
15 gamesmanship with respect to the disclosure obligations." See
16 Advisory Committee Notes to 1993 Amendments to Fed. R.
17 Civ. P. 26(a). See also Fitz, Inc. v. Ralph Wilson Plastics Co.,
18 174 F.R.D. 587, 589 (D.N.J. 1997) (Rule 26 disclosure
19 requirement should be applied with common sense). Counsel
20 who make the mistake of treating Rule 26(a)(1) disclosures as a
21 technical formality, rather than as an efficient start to relevant
22 discovery, do their clients no service and necessarily risk the
23 imposition of sanctions.

24 Sender v. Mann, 225 F.R.D. at 650.

25 Indeed, it appears from Defendant's claimed inability to comply without the
26 assistance of Defendant's undisclosed counsel is merely pretextual and Defendant's
27 providing Plaintiff with a document Defendant had previously produced, which has no
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1 bearing upon Rule 26 no intention of complying with the requirement to provide those
2 disclosures as required by Rule 26(a)(1).

3 **II. THE IMPOSITION OF MONETARY AND EQUITABLE SANCTIONS ARE**
4 **WARRANTED DUE TO DEFENDANT'S FAILURE TO COMPLY WITH**
5 **RULE 26(a)(1)**

6 **A. Monetary Sanctions Should Be Imposed Against Defendant**

7 Fed. R. Civ. P. 37 provides that:

8 (3) Specific Motions.

9 (A) To Compel Disclosure. If a party fails to make a disclosure required by Rule
10 26(a),

11 any other party may move to compel disclosure and for appropriate sanctions.

12 Fed. R. Civ. P. 37(a)(3)(A)

13 Rule 37(a) of the Federal Rules of Civil Procedure mandates an award of reasonable
14 expenses, including attorney's fees, to the prevailing party on a motion to compel
15 discovery. Plaintiff seeks sanctions in the amount of \$1,365.00 due to having to bring this
16 Motion. (Uss Decl., ¶¶ 11-14). An updated amount will be provided in Plaintiff's Reply,
17 and then at the hearing, if appropriate.

18 **B. Equitable Sanctions are Appropriate**

19 Under Rule 37(c)(1), "[i]f a party fails to provide information or identify a witness
20 as required by Rule 26(a) or (e), the party is not allowed to use that information or witness
21 to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
22 substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Here, there is nothing that
23 can be advanced by Defendant that Defendant's refusal to produce his disclosures has
24 "substantially justified."

25 "Substantial justification" has been defined as:

26 justification to a degree that could satisfy a reasonable person
27 that parties could differ as to whether the party was required to
28 comply with the disclosure request. The proponent's position

1 must have a reasonable basis in law and fact. The test is
2 satisfied if there exists a genuine dispute concerning
3 compliance.

4 Fitz.Inc. v. Ralph Wilson Plastics Co., 174 F.R.D. 587, 591 (D.N.J. 1997)

5 Defendant was, and has been, notified on a number of occasions by Plaintiff and this
6 Court concerning his need to provide his Rule 26 disclosures as required. Plaintiff has
7 made her disclosures to Defendant. Viewed in any light, Defendant's refusal to comply is
8 unwarranted and justifies the imposition of the appropriate equitable sanctions at the time
9 of trial. See, Fed. R. Civ. P. 37(c)(1).

10 **III. REQUEST FOR EXPEDITED BRIEFING**

11 In light of the Court's current scheduling in this matter, in that there is presently a
12 Pretrial Status Conference set for February 23, 2020 (See, ECF No. 18), it is imperative that
13 Defendant provide its complete initial disclosures in advance of that date. Defendant's
14 initial deadline to do so has long since passed and, under a standard briefing schedule, this
15 Motion would likely not be decided until after the upcoming Pretrial Status Conference.
16 Moreover, the matters to be determined in this Motion, Defendant calcitrant position
17 towards that which he is statutorily mandated to do, is rudimentary and straightforward. As
18 such, Plaintiff respectfully requests that Defendant be required to oppose this Motion, if at
19 all, by February 2, 2021, electronically. Plaintiff's Reply, if any, would be due on February
20 5, 2021.

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1 **IV. CONCLUSION**

2 Based upon the foregoing, Plaintiff respectfully requests that this Court issue an
3 Order compelling Defendant to provide his initial disclosures and that sanctions be awarded
4 in the manner set forth herein.

5 Dated: January 27, 2021

NUSSBAUM APC

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Richard J. Uss
Attorneys for Plaintiff Gwendolyn
Nolan

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5 Attorneys for Plaintiff Gwendolyn Nolan
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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**

11 IN RE:

12 WILLIAM K. SPENCER,

13 Debtor.
14

15 GWENDOLYN NOLAN,

16 Plaintiff,
17

18 vs.
19

20 WILLIAM K. SPENCER,

21 Defendant

Case No.: 2:20-bk-10401-BB
Adv . Case. No: 2:20-ap-01103-BB

**DECLARATION OF RICHARD J.
USS IN SUPPORT OF MOTION
COMPEL DEFENDANT WILLIAM
K. SPENCER'S INITIAL
DISCLOSURES**

Date: February 23, 2021
Time: 2:00 p.m.
Courtroom: 1539

22 I, Richard J. Uss, declare as follows:

23 1. I am an attorney at law duly licensed and admitted to practice before the
24 United States District Court, Eastern District of California, and am an associate at
25 Nussbaum APC, attorneys of record for Plaintiff, Gwendolyn Nolan ("Plaintiff"), in this
26 action. I have reviewed the entirety of the file contained in, and maintained by our firm for
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1 this matter and have personal knowledge of the following facts, and if called as a witness, I
2 could and would testify competently thereto.

3 2. As of the date I signed this Declaration, my office has no record of having
4 received Defendant's Initial Disclosures.

5 3. On June 9, 2020, my office prepared and provided Plaintiff's initial
6 disclosures to Defendant pursuant to Federal Rules of Civil Procedure 26.

7 4. On June 12, 2020, my office and Defendant met and conferred regarding the
8 Federal Rules of Civil Procedure 26 disclosures as well as those disclosures necessary for
9 the upcoming status conference that was scheduled for June 30, 2020.

10 5. Defendant failed to serve his initial disclosures within 10 days of the date of
11 that telephonic conference my office had with Defendant.

12 6. On January 14, 2021, I directed an email to Defendant concerning the lack of
13 receipt of Defendant's initial disclosures, notifying Defendant that Defendant's initial
14 disclosures had not been received to date. A true and correct copy of my January 14, 2021
15 email to Defendant is attached hereto as Exhibit A and is incorporated herein by this
16 reference.

17 7. On January 19, 2021, in an attempt to stave off having to burden this Court, I
18 again directed an email to Defendant concerning his duty to provide Plaintiff with his
19 disclosures, and that if they were not received, Plaintiff would need to proceed with a
20 motion to compel and seek sanctions as a result. A true and correct copy of my January 19,
21 2021 email to Defendant is attached hereto as Exhibit B and is incorporated herein by this
22 reference.

23 8. As a result of my email, Defendant contacted me and, feigning ignorance,
24 claimed that the attorney that has been assisting Defendant is "unavailable" and without the
25 assistance of this currently unknown counsel, Defendant would be unable to put together
26 his Rule 26 disclosures unless I assisted Defendant with doing so. At most, all I could do
27 was direct Defendant to Rule 26 itself, and advised Defendant that I could not help
28 Defendant in his preparation of the disclosures.

1 8. Defendant informed me that he would, nevertheless, look into getting me the
2 necessary initial disclosures no later than either January 25, 2021 or January 26, 2021, the
3 latter date being that which was identified in my last email correspondence to Defendant.

4 9. On January 24, 2021, Defendant sent an email with a previous joint status
5 report generated by Plaintiff as an attachment, which included numerous notations of the
6 encircled word "same". The document received was not Defendant's Rule 26 disclosures.
7 A true and correct copy of the status report received and transmitting email are collectively
8 attached hereto as Exhibit C and are incorporated herein by this reference.

9 10. In response to Defendant's email, on January 26, 2021, I notified Defendant
10 that the document received was not Defendant's Rule 26 disclosure and that the Rule 26
11 disclosures were necessary. A true and correct copy of my email to Defendant is attached
12 hereto as Exhibit D and is incorporated herein by this reference. No response has been
13 received to my email.

14 11. Based upon the upcoming trial dates, I respectfully request that this instant
15 Motion be heard in an expedited manner, and that Defendant be required to oppose this
16 Motion, if at all, by February 2, 2021, electronically. Plaintiff's Reply, if any, would be due
17 on February 5, 2021.

18 11. I am an associate at Nussbaum APC, located in Agoura Hills, California. I
19 have been a member of the Bar for the State of California for over 10 years and I have filed
20 and successfully prosecuted and defended countless cases during that time.

21 12. The hourly rate that my office bills my attorney time for is \$350.00 per hour,
22 billed in 1/10th increments of an hour (6 minutes). This rate is equal to, and in many
23 instances, well below the prevailing rate for attorneys with my level of experience in the
24 Central District of California.

25 13. I have spent 2.4 hours reviewing this file, preparing this instant Motion and
26 supporting declaration. I anticipate that Plaintiff will incur an additional 1.5 hours
27 analyzing any Opposition, preparing a Reply memorandum, and appearing at the hearing on
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1 this Motion. As a result, the total anticipated fees Plaintiff incurred in bringing this Motion
2 is \$1,365.00.

3 14. Based on the foregoing, I respectfully request that this Court award monetary
4 sanctions in the amount of \$1,365.00 against Defendant William K. Spencer due to
5 Defendant's failure to provide Defendant's initial disclosures in this matter.

6 I declare under the penalty of perjury under the laws of the State of California that
7 the foregoing is true and correct.

8 Executed this 27th day of January, 2021 in Agoura Hills, California.

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11 _____
12 Richard J. Uss
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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
27489 Agoura Rd., Ste. 102, Agoura Hills, CA 91301

A true and correct copy of the foregoing document entitled (*specify*):

AMENDED NOTICE OF MOTION AND MOTION TO COPEL DEFENDANT WILLIAM K. SPENCER'S INITIAL
DISCLOSURES PURSUANT TO FED. RULE CIV. PROC., RULE 26: REQUEST FOR MONETARY SANCTIONS
IN THE AMOUNT OF \$1365.00 AGAINST DEFENDANT WILLIAM K. SPENCER

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 01/27/2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Shraddha Bharatia - notices@becket-lee.com, Carolyn A Dye (TR) - trustee@cadye.com, Jennifer H Wang - jwang@cookseylaw.com, Daniel King - dking@theattorneygroup.com, United States Trustee (LA) - ustpregion16.la.ecf@usdoj.gov

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) 01/27/2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Honorable Sheri Bluebond - 255 E. Temple Street, Suite 1534 / Courtroom 1539, Los Angeles, CA 90012
William K. Spencer - 2330 E Del Mar #111, Pasadena, CA 91107

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

01/27/2021 Shauna Wilcox
Date Printed Name

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.